No. 04-373

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND

Petitioner,

— v. —

LEEANDER JEROME BLAKE,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT

I. VIOLATIONS OF THE PROHIBITION ON POLICE-INITIATED INTERROGATION FOLLOWING CLEAR REQUESTS FOR COUNSEL SHOULD NOT BE "CURABLE" DURING THE SAME CUSTODIAL INTERROGATION 9

A. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Is Inconsistent With The Vital Purposes and Objectives Of That Rule 10

B. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule During The Same Custodial Interrogation Will Undermine The Vital Interests In Clarity and Guidance For Law Enforcement And Courts 12

C. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Will Invite Circumvention Of The Essential Safeguards Provided By That Rule 14

D. The Balance of Interests At Stake Does Not Justify The Conclusion That *Edwards* Violations Are Curable 16

II. IF VIOLATIONS OF THE *EDWARDS* PROHIBITION ARE DEEMED CURABLE DURING THE SAME CUSTODIAL INTERROGATION, ONLY MEASURES THAT CLEARLY ELIMINATE THE RISKS GENERATED BY OFFICIAL INITIATION SHOULD SUFFICE 19

III. UNDER ANY DEFENSIBLE STANDARD FOR DETERMINING WHETHER THE IMPACT OF AN IMPROPER OFFICIAL INITIATION HAS BEEN ELIMINATED, THE RECORD BELIES THE POSSIBILITY THAT THE GRATUITOUS AND COERCIVE VIOLATION OF THE *EDWARDS* RULE WAS CURED 23

CONCLUSION 30

TABLE OF AUTHORITIES

Cases ***Page***

Arizona v. Roberson,
486 U.S. 675 (1988) 9, 11, 13, 15, 16, 20, 27

Blake v. State,
381 Md. 218, 849 A.2d 410 (2004)
..... 3, 4, 5, 24, 25, 26, 27, 29

Davis v. United States,
512 U.S. 452 (1994) 9, 12, 13, 17, 19, 22

Dickerson v. United States,
530 U.S. 428 (2000) 11

Edwards v. Arizona,
451 U.S. 477 (1981) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30

Harris v. New York,
401 U.S. 222 (1971) 16

Johnson v. United States,
333 U.S. 10 (1948) 15

McNeil v. Wisconsin,
501 U.S. 171 (1991) 11

Michigan v. Harvey,
494 U.S. 344 (1990) 11

Michigan v. Mosley,
423 U.S. 96 (1975) 11, 19, 26

Page

Minnick v. Mississippi,
498 U.S. 146 (1990) 9, 11, 12, 13, 15, 17, 18, 22, 28

Miranda v. Arizona,
384 U.S. 436 (1966)
..... 1, 5, 8, 12, 13, 14, 15, 16, 17, 18, 19, 23, 28, 30

Missouri v. Seibert,
124 S.Ct. 2601 (2004) 8, 11, 12, 13, 14, 15, 16

Moran v. Burbine,
475 U.S. 412 (1986) 17

New York v. Quarles,
467 U.S. 649 (1984) 16

Oregon v. Bradshaw,
462 U.S. 1039 (1983) 9, 27

Oregon v. Elstad,
470 U.S. 298 (1985) 15

Oregon v. Hass,
420 U.S. 714 (1975) 18

Patterson v. Illinois,
487 U.S. 285 (1988) 12

Rhode Island v. Innis,
446 U.S. 291 (1980) 18, 27, 28

United States v. Gomez,
927 F.2d 1530 (11th Cir. 1991) 4

Page

United States v. Patane,
124 S.Ct. 2620 (2004) 8, 16, 18

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 11,000 attorneys and 28,000 affiliate members in 50 states. *Amicus* is dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of American criminal justice systems, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

On September 19, 2002, Straughan Griffin was shot and killed in front of his Annapolis home. The authorities arrested Terrence Tolbert on October 25, and he made a statement implicating respondent, Leeander Blake, in the killing. Blake, a 17-year-old, was arrested at his home between 4:30 and 5:00 a.m. the next day. While clad in only boxer shorts and a tank top, he was transported to the Annapolis Police Department and escorted to an intake room. Lead Detective William Johns advised Blake of his *Miranda* rights. When he responded by clearly and unambiguously requesting the assistance of counsel, Blake was placed in a holding cell. The time was approximately 5:25 a.m.

At 6:00 a.m., Detective Johns came to the cell. In accordance with Maryland law, he handed Blake a copy of the arrest warrant and a statement of charges. The statement

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

indicated that Blake was charged with first and second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. Although Blake's age made him ineligible for capital punishment, the document declared that the penalty for first degree murder was "DEATH." It also asserted that Tolbert had accused Blake of shooting Griffin, taking his car keys, and running over him while leaving the scene. Johns explained the charges to Blake, stating that they were serious and informing him that he needed to read the document carefully and make sure he understood it.

When Johns turned to leave the cell, Officer Reese, who had no ostensible reason to be present, said to Blake in a loud and confrontational tone, "I bet you want to talk now, huh!" Johns reacted by telling Reese, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." He then pushed Reese from the cell block.

Blake remained in the cell, still wearing only his underwear. Just twenty-eight minutes later, Detective Johns returned. When he walked in front of the cell and handed Blake his clothing, Blake inquired, "I can still talk to you?" Johns asked if he now wanted to talk, and Blake said that he did. A few minutes later, Blake was once again advised of his rights. He waived those rights and agreed to talk without counsel. He then made incriminating statements, explaining his involvement in the events of September 19. Blake also agreed to submit to a polygraph examination. He was transported to another location, took the polygraph, and then made additional statements.

Blake was indicted for first and second degree murder and manslaughter. Before trial, he moved to suppress his statements. At a suppression hearing, Blake testified that when Detective Johns came to the cell with his clothing, he decided to speak because of Officer Reese's earlier statement and

because he was scared after seeing that he "was facing death." The judge granted the motion to suppress, finding that Blake had requested counsel and that even though he had not indicated a change of heart, Officer Reese had interrogated him. She determined that "Blake's question [of Johns was] in direct response to Reese's previous statement," emphasizing that a mere twenty-eight minutes elapsed between Reese's remark and Blake's inquiry and concluding that the evidence showed "one continuous stream of events." According to the judge, the state did not carry its "heavy burden" of showing that Blake's "waiver was not the result of the previous coercive unlawful police conduct."

In an unreported opinion, the Court of Special Appeals reversed the Circuit Court's ruling on the sole ground that Officer Reese's statement was not "interrogation." The Maryland Court of Appeals then reversed the intermediate court's ruling, affirming the trial court's suppression order. 381 Md. 218, 849 A.2d 410 (2004). The court devoted most of its opinion to the question of whether Officer Reese had interrogated Blake, concluding that interrogation had indeed occurred. It then turned attention to the State's contention that Blake had "reinitiated" the interrogation and had then waived his rights. The court noted that the Circuit Court judge, by finding that Blake's "question was 'in direct response to' Officer Reese's coercive statement," had effectively concluded that "the police [had] reinitiated the contact" after Blake had invoked his right to counsel. *Id.* at 238, 849 A.2d at 422.

The court agreed that the police had violated the rule of *Edwards v. Arizona* by initiating contact with Blake after his request for counsel. Blake's inquiry whether he could "still talk to" Officer Johns was not an initiation "in a legal sense" because it was preceded by the delivery of

a document that [erroneously] told him he was

> subject to the death penalty . . .; [Blake] was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that [he] might want to talk; and the misstatement as to the penalty as . . . 'DEATH' had never been corrected. [Moreover, t]here was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive [sic] interrogation. *Id.* at 239, 849 A.2d at 422.

Significantly, the court "reject[ed] the State's argument that . . . Detective Johns somehow cured the violation by" his reaction to Officer Reese's impropriety. *Id.* According to the court, the trial judge's conclusion that Johns's "remarks did not negate" the effect of Reese's conduct "was not clearly erroneous," and the "very short," twenty-eight minute break between Reese's impropriety and Blake's "inquiry . . . indicat[ed] that the latter was a continuation of the former." *Id.* The "record support[ed] the . . . finding that [Blake's] question was in direct response to Officer Reese's" conduct and that he "did not 'initiate' conversation with the police." *Id.* at 239-40, 849 A.2d at 422. In sum, the Court of Appeals did not reject the possibility that the authorities *could* cure a violation of the prohibition on police-initiated interrogation following a clear request for counsel. The court merely held that the record and findings in this case did not support the contention that a "cure" had been effected. The court evinced concern that if courts were excessively willing to validate the authorities' claims that they had "cured" their unlawful initiations, the protections afforded by *Edwards v. Arizona* "'would be rendered meaningless.'" *Id.* at 240, 849 A.2d at 423 (quoting *United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991)). Ultimately, the court ruled "that all statements made by [Blake] after he invoked his *Miranda* rights [were]

inadmissible and [that] the motion to suppress the statements was properly granted." *Id.*

The State of Maryland petitioned this Court for a writ of *certiorari* to the Court of Appeals of Maryland. The petition raised a single question: whether the rule of *Edwards v. Arizona* should be interpreted to permit the authorities to "cure" their violations of the prohibition on police-initiated interrogation following a suspect's invocation of his right to counsel. Put otherwise, the question presented was whether a court may properly conclude that a suspect has initiated communications with the police *after* an improper official initiation. On April 18, 2005, this Court granted the writ.

SUMMARY OF ARGUMENT

According to the *Miranda* doctrine, a request for counsel by a suspect in custody is a "significant event" that calls for additional Fifth Amendment safeguards. Following a suspect's assertion of his right to counsel, officer-initiated interrogation is forbidden. If officers do initiate communications in violation of this prohibition, it should not be possible for them to "cure" that violation during the same custodial interrogation. Recognition of a cure option is inconsistent with the goal of protecting suspects against badgering by the authorities and with the objective of preventing the unconstitutional introduction of compelled statements. No supposedly curative measures can adequately respond to the heightened, "unacceptably great" risk of compulsion generated by the official impropriety.

The provision of clear guidance and bright-line rules for officers and courts is one of *Miranda*'s principal advantages. Endorsement of the possibility that officers can cure the harm done by improper initiations would seriously undermine the clarity of and guidance provided by the rule of

Edwards v. Arizona. Denying the cure option would further vital interests in clarity and guidance.

In addition, allowing officers to cure violations of the rule against post-invocation initiation will invite officers to circumvent that rule. The possibility of transgressing the *Edwards* prohibition then taking curative steps will tempt officers to exploit the vulnerability of those who have clearly evinced a need for assistance. The result will be an erosion of respect for an essential Fifth Amendment safeguard outside the courtroom and heightened risks of constitutional violations in the courtroom.

Finally, the balance of interests does not justify a cure option. The interests in safeguarding against intensified risks of compulsion, in maintaining *Miranda*'s clarity, and in not providing incentives to circumvent the *Edwards* rule are weighty. On the other hand, the current law already provides a number of alternatives for obtaining uncoerced statements from suspects–even those who have asserted their entitlement to counsel. These alternatives adequately serve legitimate interests in effective law enforcement. Adding the possibility of violating the *Edwards* rule, then curing those violations, can only skew the balance by increasing the harm to the Fifth Amendment interests served by *Miranda* while only marginally furthering proper law enforcement efforts.

If the Court does endorse the possibility of curing *Edwards* violations, the same balance of interests dictates adoption of a stringent, demanding standard for determining whether the risks of improper initiation have been eliminated. The psychological impact on a vulnerable suspect of seeing and hearing officers disregard a request for assistance is likely to be devastating. A cure standard that is appropriately sensitive to the objectives of *Edwards* must seek to ensure that this impact, and the consequent risks of compulsion, have been

entirely eliminated. The law should demand proof by the government that there is *no* causal connection between the official misconduct and the suspect's willingness to discuss the investigation. Put simply, if cure is possible, it should be found *only* if it is clearly established that a reasonable person in the suspect's position would not have been influenced or prompted to initiate communications by the officer's earlier initiation. This demanding standard is needed to respond to the constitutional risks the officers have created. Moreover, this heavy burden is fair, even-handed, and justified because the increased risks are the direct result of avoidable, official impropriety and because a suspect, to gain the additional protection furnished by *Edwards*, must clearly and unambiguously express a desire for counsel.

Under *any* rational standard for evaluating whether an official initiation has been cured, even a standard that is inappropriately lenient, the record in this case cannot possibly support a conclusion that the police cured their transgression. The 17-year-old suspect, arrested in the early morning and wearing only underwear, was transported to a holding cell. He clearly asked for counsel. Less than half an hour later, Detective Johns delivered a document that informed him that he was charged with murder, falsely stated that the penalty was DEATH, and included a blame-shifting statement by another man. The detective stressed the serious nature of the charges and instructed the suspect to read the document. Officer Reese, who had no reason to be present, directly challenged the suspect to respond, stating, "I bet you want to talk now, huh!" Each officer's conduct constituted a coercive initiation of communications. Both in combination sent an overpowering message of disregard for the suspect's need for assistance.

The State's argument that the risks were cured rests entirely on the a single fact–that Detective Johns reacted to Officer Reese's remark by saying that they could not talk to the

suspect and by pushing him from the jail cell. This minimal action, which was not directed toward the suspect, could not have begun to combat the risks engendered by Reese's charged statement. Moreover, no effort was made to combat the impact of Detective Johns's unjustified actions and words and of the erroneous message that the suspect was facing DEATH. When the detective returned to the cell a mere thirty minutes later, the suspect asked whether he could "*still* talk" to the officer. The evidence showed and the lower courts found that this inquiry was directly responsive to Officer Reese's improper remark. The State concedes that it was a reaction to the information in the document that he had received. The strong causal connections between the official initiations of communications and the suspect's conduct preclude a finding of cure and a conclusion that the suspect initiated the exchange that led to his admissions. The decision of the Court of Appeals should be affirmed.

ARGUMENT

After nearly four decades as the law of the land, the dictates of *Miranda v. Arizona*, 384 U.S. 436 (1966), have become "important and accepted element[s] of the criminal justice system." *Missouri v. Seibert*, 124 S.Ct. 2601, 2614 (2004) (Kennedy, J., concurring). Yet *Miranda*'s vital "protect[ion] against violations of the Self-Incrimination Clause," *United States v. Patane*, 124 S.Ct. 2620, 2626 (2004), will not long remain "important" or "accepted" if both its exclusionary consequences–*i.e.*, the shield it furnishes in the courtroom–and its substantive standards–*i.e.*, the shelter it provides in the police station–are consistently diluted. The narrowness of the specific question before the Court should not obscure the significance of the competing interests involved. At stake here are the integrity and fairness of the balance of interests underlying *Miranda*, the clarity of the guidance provided by the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), and, ultimately, the preservation of respect for the Fifth Amendment privilege. A just balance *in this case* requires affirmance of the lower court's ruling. A fair balance *for all cases* requires affirmation of the constitutional protection that *Edwards* extends to the most vulnerable suspects.

I. VIOLATIONS OF THE PROHIBITION ON POLICE-INITIATED INTERROGATION FOLLOWING CLEAR REQUESTS FOR COUNSEL SHOULD NOT BE "CURABLE" DURING THE SAME CUSTODIAL INTERROGATION

An "assertion of the right to counsel [is] a significant event" that calls for "additional safeguards" against violation of the Fifth Amendment privilege. *Edwards v. Arizona*, 451 U.S. at 484-485. Consequently, when a suspect in custody invokes his right to counsel, officers may interrogate him *only* if counsel is present or the suspect initiates further communications. *Edwards v. Arizona*, 451 U.S. at 484-85; see also *Davis v. United States*, 512 U.S. 452, 458 (1994); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983). If officers initiate communications with the suspect, no waiver of rights can be valid. See *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (waiver at authorities' instigation is presumed compelled, not the product of voluntary choice). The first question here is whether a violation of the rule barring the initiation of communications by officers can be cured. As a general rule, official violations of the *Edwards* rule should not be "curable."[2] Once officers have initiated communications with

2. It is not the contention here that after an officer initiates communications following a request for counsel, a suspect himself can *never* (continued...)

a suspect in custody, it should not be possible to conclude that the suspect has initiated communications with the authorities, countermanding his decision to rely on counsel.[3]

A. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Is Inconsistent With The Vital Purposes and Objectives Of That Rule

The prohibition of officer-initiated interrogation following a suspect's clear request for counsel was developed in response to this Court's well-founded belief that a suspect who has unambiguously expressed a need for assistance to the authorities has demonstrated an incapacity and vulnerability that dramatically heighten the risks of compulsion already inherent in the custodial interrogation atmosphere. The purpose of the ban on officer-initiated interrogation is to prevent the authorities from "badgering a [suspect] into waiving his previously asserted . . . rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). The ultimate objective is to "ensure[] that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. at 151.[4] This "second layer of prophylaxis," *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991), is a necessary shield against an "unacceptably great" risk, see *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that a suspect will be compelled to confess and that his compelled statement will be used to incriminate him in violation of the Fifth Amendment. See *Missouri v. Seibert*, 124 S.Ct. at 2608 (suspect's exercise of rights must be honored to reduce the risk of coercion and to enforce the Self-Incrimination Clause).

By improperly initiating communications with a suspect who "believes that he is not capable of undergoing . . . questioning without advice of counsel," *Arizona v. Roberson*, 486 U.S. at 681, and has "expressed his own view that he is not competent to deal with the authorities without legal advice," *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring in the result), officers exploit the suspect's weakness, intensify the pressures already present, and engender an undeniably "serious risk" of compulsion. *Roberson*, 486 U.S. at 686. Indeed, when officers confront an avowedly vulnerable suspect with the message that his need for counsel will not be honored the presumption of compulsion

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2. (...continued)
initiate communications with law enforcement. The contention here is that a bright-line rule ought to govern as long as the same custodial interrogation continues. If the facts clearly establish that a subsequent custodial interrogation is a *genuinely separate and distinct experience* from the one in which officers failed to respect the *Edwards* prohibition, it may be possible for a suspect to initiate communications with the authorities. Factors potentially relevant to deciding whether an interrogation context is genuinely separate and distinct could include the length of time that has passed, whether custody has been continuous or interrupted, whether the officers are the same, and whether the offense is the same, among others. The relevant question would be whether the suspect, or a reasonable person in the suspect's position, would understand the custodial interrogation to be entirely independent of the one in which officers disregarded or ignored his request for assistance and no single fact should automatically be determinative.

3. Because "initiation," by definition, is an inquiry into who *first* expressed a desire to discuss the investigation, once officers initiate communications, a suspect cannot initiate communications during the same custodial interrogation.

4. The State at times describes the purpose of the *Edwards* rule correctly. Some of its descriptions, however, misleadingly suggest that *Edwards* was designed "to ensure that a suspect retains the right to choose whether to remain silent or speak to the police." Brief for Petitioner at 16, 17. Clearly, the *Edwards* rule does not preclude a suspect from changing his mind on his own, but its thrust and its prime objective is to *protect* needy, vulnerable suspects against compulsion, *not* to preserve their right to choose.

that underlies *Miranda*'s preventive scheme is *most* justified.[5] As long as the same custodial interrogation continues, a subsequent communication by the suspect should be presumed to be the result of the officer's impropriety, not the product of an unprompted, voluntary change of heart regarding the need for assistance.

Because "[p]reserving the integrity of the accused's choice to communicate with the police only through counsel is the essence of *Edwards* and its progeny," *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court should hold that a suspect cannot initiate communications once communications have already been initiated by the authorities. The "cure" option advocated here "is inconsistent with *Edwards*'[s] purpose to protect the suspect's right to have counsel present at custodial interrogation," *Minnick v. Mississippi*, 498 U.S. at 154, and would seriously undermine the primary objective of ensuring that convictions are not based upon coerced statements. A recognition that violations can be cured during the same custodial interrogation would "effectively threaten[] to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted." *Missouri v. Seibert*, 124 S.Ct. at 2613.

B. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule During The Same Custodial Interrogation Will Undermine The Vital Interests In Clarity and Guidance For Law Enforcement And Courts

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5. See *Davis v. United States*, 512 U.S. at 472-73 (Souter, J., concurring in the judgment)(when a suspect's expressed wish for counsel is ignored, in contravention of the rights recited, "he may well see further objection as futile and confession . . . as the only way to end his interrogation").

In general, the "clarity" of *Miranda* doctrine "is one of its strengths." *Missouri v. Seibert*, 124 S.Ct. at 2616 (Kennedy, J., concurring in the judgment); see also *Arizona v. Roberson*, 486 U.S. at 680 (reiterating that "ease and clarity of application" is a "'principal advantage[]'" of *Miranda*). The "bright-line" nature of the *Miranda* scheme has the virtue of clearly informing officers of the specific restrictions placed upon them by the Fifth Amendment and of clearly informing judges of the circumstances that determine admissibility. See *Minnick v. Mississippi*, 498 U.S. at 151; *Arizona v. Roberson*, 486 U.S. at 681. The guidance provided enables officers to avoid conduct that can jeopardize constitutional rights and undermine investigations, see *Davis v. United States*, 512 U.S. at 461, and enables the courts to "conserve judicial resources." *Minnick v. Mississippi*, 498 U.S. at 151.

The Court has "repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards*," and has sought to develop standards to govern invocations of counsel that "serve[] the purpose of providing 'clear and unequivocal' guidelines." *Arizona v. Roberson*, 486 U.S. at 681-682. In cases involving significant invocation of counsel issues, uncertain, ill-defined standards have been rejected because they could have resulted in reductions of "clarity and ease of application," *Davis v. United States*, 512 U.S. at 461, could have "spread confusion through the justice system[,]" and could have led "to a consequent loss of respect for the underlying constitutional principle." *Minnick v. Mississippi*, 498 U.S. at 155.

The clearest reasonable alternative in situations involving initiations by officers following unequivocal requests for assistance is a rule that initiation by the suspect is not legally possible during the same custodial interrogation–*i.e.*, a rule that precludes the option of "curing" *Edwards* violations. This approach would inform officers that

once they fail to honor a suspect's request, the only circumstance in which they may proceed with interrogation would be with counsel present. A contrary holding–a conclusion that officers can violate *Edwards* and then cure their transgressions–would require a delineation of standards for judging whether sufficient curative steps have been taken. As will be seen below, it is *possible* to devise such standards. However, any standards capable of furthering the purposes of the *Edwards* doctrine effectively would inevitably inject ambiguity and uncertainty, spreading confusion that would undermine the goals of providing officers and courts with guidance and conserving judicial resources. This Court should preserve the bright-line character of the *Edwards* doctrine by declaring, once again, that initiation by an officer precludes further interrogation without counsel.

C. Allowing Officers To "Cure" Their Violations Of The *Edwards* Rule Will Invite Circumvention Of The Essential Safeguards Provided By That Rule

From long before *Miranda* until the present, the Court has devoted considerable effort to developing legal standards that ensure that efforts to obtain and introduce confessions do not threaten fundamental constitutional liberties. In part because of an understandable desire to protect society from crime and in part because of resistance to the constitutional constraints imposed by the Court's rulings, see *Missouri v. Seibert*, 124 S.Ct. at 2608, 2613, law enforcement agents have sometimes sought to circumvent those constraints. Some legal standards invite evasion. *Miranda* itself was in part a response to official exploitation of the malleability and indefiniteness of the Due Process-coerced confession doctrine. Because of the fact-specific, totality-of-the-circumstances nature of that doctrine, officers and courts who were so inclined could almost always distinguish a particular case from any of the Court's precedents. Moreover, just last term, the Court

acknowledged that in response to *Oregon v. Elstad*, 470 U.S. 298 (1985), law enforcement agencies had developed a "question-first" technique whose very purpose was "to circumvent *Miranda v. Arizona*." *Missouri v. Seibert*, 124 S.Ct. at 2614 (Kennedy, J., concurring in the judgment).

This Court has recognized the likelihood that officers will be tempted to "bypass proper procedures" as dictated by the *Edwards* doctrine, see *Arizona v. Roberson*, 486 U.S. 688 n. 7, and has been influenced by the fact that "pressures" and "abuses . . . may be concomitants of custody." *Minnick v. Mississippi*, 498 U.S. at 153. Unless there is very good reason, the Court should avoid interpretations of *Edwards* that invite exploitation and circumvention by "officer[s] engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). There is very little, if any, reason to authorize officers to "cure" improper initiations of communications in disregard of suspects' requests for counsel, yet the option of "cure" will undoubtedly tempt many to ignore *Edwards*'s constraints and endeavor to lure suspects into retracting expressed wishes for assistance. Officers who fear that a suspect will not change his mind on his own, at least not before the formal processes of prosecution inject counsel into the equation, will see the possibility of cure as an opportunity to prompt the suspect to say something. When officers learn that they can undo their own wrongs, a fair number will predictably exploit the opportunity.[6]

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6. An officer's subjective intention is not relevant to determining whether she has complied with *Miranda*. See *Missouri v. Seibert*, 124 S.Ct. at 2612 n.6 (plurality opinion); *id.* at 2617-19 (O'Connor, J., dissenting). Consequently, the strong temptation to deliberately ignore requests for counsel provided by the "cure" option will not be counteracted by fear that improper motives will count against a "cure" finding. The violations that

(continued...)

Official disregard of constitutionally-rooted safeguards can only frustrate the purposes of those safeguards and erode respect for the underlying constitutional guarantee. Standards that tempt and are likely to induce officers to ignore *Miranda*'s protective scheme and exploit opportunities to take advantage of vulnerable suspects will surely undermine the importance and acceptance of that scheme. To forestall another wave of deliberate, corrosive disrespect for *Miranda*'s constitutional rules–a wave similar to the one that precipitated *Seibert*–the Court should deny the possibility of "cure."

D. The Balance of Interests At Stake Does Not Justify The Conclusion That *Edwards* Violations Are Curable

The "concerns underlying the *Miranda* . . . rule must be accommodated to other objectives of the criminal justice system." *United States v. Patane*, 124 S.Ct. at 2631 (Kennedy, J., concurring in the result). Put otherwise, in interpreting *Miranda*'s "preventative" scheme, it is "essential" to "strike[] an appropriate balance" between "the suspect's freedom from coercion" and "legitimate law enforcement" interests. *Arizona v. Roberson*, 486 U.S. at 691 (Kennedy, J., dissenting). Such interest balancing has informed the Court's resolution of a variety of *Miranda* issues. See, e.g., *New York v. Quarles*, 467 U.S. 649 (1984); *Harris v. New York*, 401 U.S. 222 (1971).

The weighty interests on one side of the scale have already been discussed. A rule permitting officers to cure *Edwards* violations heightens the risks that vulnerable suspects will be compelled to confess and that the introduction of those confessions will result in Fifth Amendment violations.

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6. (...continued)
officers will seek to cure will include both innocent errors and deliberate disregards of the *Edwards* rule.

Moreover, a "cure" alternative would "muddy[] *Miranda*'s otherwise relatively clear waters," *Moran v. Burbine*, 475 U.S. 412, 425 (1986), and would provide potent incentives to evade the critical safeguards afforded by the *Edwards* rule. Consequently, the *Miranda* doctrine should be construed to permit cures *only* if a refusal to dilute *Edwards* by allowing cure would defeat legitimate and substantial law enforcement interests.[7]

Law enforcement interests in obtaining voluntary admissions are more than adequately served by the current doctrine. A rule that would allow cures of *Edwards* violations would promote legitimate interests marginally, if at all, while inflicting substantial harm on constitutional liberties. First, *Edwards*, itself, *expanded* the opportunities to obtain admissions following an invocation of the right to counsel. *Miranda* had rigidly declared that after a request for counsel, "the interrogation must cease *until an attorney is present*." 384 U.S. 436, 474 (1966) (emphasis added). The *Edwards* Court broadened law enforcement authority by permitting interrogation absent counsel whenever a suspect initiates communications and waives his rights. Second, officers are constrained by the *Edwards* prohibition *only* in the limited number of cases in which suspects *clearly and unambiguously* request counsel. *Davis v. United States*, 512 U.S. 452 (1994). Moreover, even in this small subset of cases, officers are not barred from securing admissions of guilt. They may

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7. This is not a case in which there is a need to justify an "extension" of the protections afforded by *Miranda*. The approach proposed by the State–allowing officers to violate the law, then cure their transgressions–would *contract* the bright-line, systemic protection already afforded by *Edwards* by according officers yet another opportunity to conduct custodial interrogation outside the presence of counsel. Consequently, this case bears similarity to *Minnick v. Mississippi*, 498 U.S. 146 (1990), a decision refusing to shrink *Edwards*'s protection by allowing officers to initiate interrogation following consultation with counsel.

interrogate if the suspect on his own initiative evinces a willingness to discuss the investigation and waives his rights, *Minnick v. Mississippi*, 498 U.S. at 156, and they may interrogate in the presence of counsel. *Id.* at 152-53. And even if the suspect does not initiate communications and counsel is not present, they may interact with the suspect in any way that does not rise to the level of interrogation. *Edwards v. Arizona*, 451 U.S. at 486; *see, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291 (1980).

If the Court rejects the possibility of cure, the only instances in which statements will be excluded are the undoubtedly small number of cases in which officers, within the same custodial interrogation, ignore clear requests for counsel, initiate communications, and then conduct interrogations. In those cases, the suppression of a suspect's admissions is amply justified by an appropriate balance of interests.[8]

To give substance to *Miranda*'s dictates, the *Edwards* doctrine "insist[s] that neither admissions nor waivers are effective unless there are both *particular and systemic assurances* that the coercive pressures of custody were not the inducing cause." *Minnick v. Mississippi*, 498 U.S. at 155 (emphasis added). Occasionally, the systemic assurances necessary to prevent unacceptable risks of compelled self-incrimination at trial will lead to the exclusion of a voluntary

8. In striking the balance, the severe limitations on the scope of exclusion under *Miranda* must also be taken into account. The absence of a fruit-of-the-poisonous tree doctrine, see *United States v. Patane*, 124 S.Ct. at 2620 (2004), and the availability of impeachment use of a suspect's statements even when his request for counsel has been dishonored, see *Oregon v. Hass*, 420 U.S.714 (1975), weigh heavily on the government's side of the balance, supporting the contention that law enforcement interests are adequately served by the current doctrine.

statement. This cost is offset, and justified, by the numerous instances in which the same systemic assurances exclude a compelled confession that would not be identified by a case-by-case approach.[9] In the context at issue here, the minor harm to law enforcement interests caused by denying the "cure" option is clearly counterbalanced by substantial gains in protecting the constitutional rights of the most susceptible suspects. The current doctrine, without a "cure" option, already affords generous opportunities for law enforcement to obtain uncoerced cooperation from those suspects. *Davis v. United States*, 512 U.S. at 461 (the *Edwards* prohibition does not "unduly hamper[] the gathering of information"). The availability of a cure alternative would skew the balance, tipping it decidedly in favor of law enforcement interests.

In this case, it is indisputable that the suspect was subjected to one, continuous custodial interrogation. Once the authorities initiated communications with him, he was not subject to further interrogation unless counsel was present. Because he was interrogated in the absence of counsel, the conclusion that his statements were inadmissible was clearly correct and should be affirmed.

II. IF VIOLATIONS OF THE *EDWARDS* PROHIBITION ARE DEEMED CURABLE DURING THE SAME CUSTODIAL INTERROGATION, ONLY MEASURES THAT CLEARLY ELIMINATE THE RISKS GENERATED BY OFFICIAL INITIATION SHOULD SUFFICE

9. Denial of an opportunity to "cure" official initiations would not "transform the *Miranda* safeguards into wholly *irrational* obstacles to *legitimate* police investigative activity." *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)(emphasis added). Instead, allowing cure would lower a rational barrier to illegitimate conduct likely to generate compulsion to speak.

The balance of pertinent interests militates powerfully against the "cure" option advocated by the State. If the Court is nonetheless persuaded that officers should be able to remedy their own wrongs, the same reasons that support outright rejection of the "cure" alternative dictate adoption of a demanding standard for determining whether officers have taken sufficient curative steps. A weak, toothless standard would engender unacceptably high risks of conviction based on compelled statements and would be unfair in light of the demand that a suspect must unambiguously ask for counsel to merit the protection of *Edwards*.

As already noted, the *Edwards* rule is designed to prevent officers from "badgering" vulnerable suspects into waiving their rights and submitting to questioning without counsel. Officer-initiated interrogation after a clear request for counsel is forbidden because it "will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Arizona v. Roberson*, 486 U.S. at 686. The concern is that answers given in such circumstances will be the product of compulsion and that their admission into trials will violate the Fifth Amendment privilege.

A suspect who has seen and heard officers disregard a clear request for assistance is likely to feel that the entitlement to counsel is meaningless and that the authorities–those with power to control his fate–desire, indeed, are determined, to question him without assistance. Put simply, the psychological impact of repeated approaches on an individual who has unambiguously evinced his incompetence and vulnerability is likely to be devastating. Steps taken at that point to counteract the message conveyed by the initiation are quite unlikely to restore the *status quo ante–i.e.*, to put the suspect in the position he was in immediately after his request. If anything, efforts to contradict the impression created by official

initiation are likely to confuse and unsettle a needy suspect.[10]

The logic that underlies the *Edwards* prohibition suggests that cures should be possible, if at all, *only* when the government shows post-initiation measures or events that clearly eliminate the psychological impact and heightened risks of compulsion generated by an officer's improper conduct. The law should demand not only a clear negation of the message delivered, but also proof that there was *no* causal connection between the officer's initial conduct and the suspect's willingness to discuss the investigation. Assuming an objective standard is appropriate, cure should be found *only* if it is established that a reasonable person in the suspect's position[11] *clearly would not have been influenced or prompted to initiate communications by the officer's earlier initiation.* A less stringent standard would invite the very risks that *Edwards* was designed to combat.

Moreover, a demanding standard such as that suggested is fair and even-handed. After all, the only reason that a cure is required is the government's failure to abide by (or deliberate defiance of) the clear, simple dictates of the *Edwards* rule. A demand for a clear showing that there is no connection between the officer's impropriety and the suspect's conduct–*i.e.*, that the suspect's desire to talk was not influenced by the officer's expressed wish to interact without a lawyer present–is needed to inform the law enforcement community that the *Edwards* prohibition is important and must be respected. Only a stringent standard can motivate a

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10. These are additional reasons why rejection of the possibility of "cure" is by far the preferable approach.

11. At the very least, evident characteristics of the suspect and of his situation–*e.g.*, his age, the time of day–should be taken into account in assessing the suspect's position.

desirable level of compliance. In addition, a suspect must be clear in expressing his desire for counsel and cannot gain the shelter furnished by *Edwards* unless he avoids all ambiguity. *Davis v. United States*, 512 U.S. at 459. To protect a suspect who has satisfied this demanding invocation standard, it is only fair to require the government to show that he was clearly not influenced by official initiation and decided, entirely on his own, to change his mind about the need for assistance.[12]

When the facts of this case are measured against an appropriately demanding standard, it is clear that the Court of Appeals correctly rejected the government's claim that the *Edwards* violation in this case was cured. The Maryland courts found a psychological connection between what Officer Reese said and the juvenile suspect's inquiry whether he could "still" talk to the police. Moreover, the State did not show that a reasonable suspect in Blake's position clearly would not have been influenced or prompted by the official conduct in violation of *Edwards*. The sole fact relied upon by the State–that Detective Johns reacted negatively to his colleague's improper statement–was patently inadequate to

12. No effort is made here to catalogue *all* of the factors that might be relevant to deciding whether the proposed standard has been satisfied. The time between the official initiation and the putative suspect initiation is potentially pertinent, though a long lapse alone should hardly suffice in light of the increased pressure generated by prolonged custody. *Minnick v. Mississippi*, 498 U.S. at 153. Statements made directly to the suspect are also potentially relevant, but care should be taken to ensure that further communications by the authorities do not exacerbate the situation. After all, to a suspect who has heard officers initiate the dialogue, a statement admitting error and reiterating that the choice to be questioned without counsel is the suspect's might well intensify the feeling that the authorities, in fact, desire to question him without counsel. The difficulty of specifying appropriate factors and the uncertain impact of any subsequent event or conduct provide additional reasons not to allow cures at all.

eliminate the heightened risks of compulsion in this case.[13]

III. UNDER ANY DEFENSIBLE STANDARD FOR DETERMINING WHETHER THE IMPACT OF AN IMPROPER OFFICIAL INITIATION HAS BEEN ELIMINATED, THE RECORD BELIES THE POSSIBILITY THAT THE GRATUITOUS AND COERCIVE VIOLATION OF THE *EDWARDS* RULE WAS CURED

Under either of the approaches already proposed for resolving the issue raised by this case, the conclusion of the Court of Appeals must be affirmed. It would be a serious mistake to adopt a more lenient standard for evaluating whether curative measures are sufficient. Nonetheless, the facts of this case are so egregious that no finding of cure is possible under even the least stringent of tests.

The State contends that the appropriate approach is one that looks to the totality of the circumstances, see Brief for Petitioner at 10, 19, to determine whether "curative measures and other intervening factors . . . show that the police honored the suspect's choice whether to speak, and [that] the suspect changed his mind." *Id.* at 10. Alternatively, the State suggests that the proper inquiry is whether the police "conveyed" or "made it clear" to the suspect "that the police intended to honor his choice to communicate with them only through counsel." *Id.* at 28, 30. The totality nature of this determination would seriously undermine *Miranda*'s goal of providing clear, bright-line guidance for officers and courts. More important, the proposed approach is insufficiently

13. Moreover, as will be seen below, Johns's conduct in delivering the erroneous charging statement to Blake, emphasizing the seriousness of the charges, and informing Blake that he needed to read the document constituted additional, highly coercive, uncured initiation by the authorities.

demanding in light of the fact that it is designed for cases in which an avowedly vulnerable suspect has already seen his request for counsel dishonored by the authorities. Because the police have already shown the suspect that they *do not* intend to respect his request, only a showing that the suspect clearly was unaffected by the official impropriety should suffice.

Even under the State's dangerously permissive standard, the record in this case cannot support a cure finding. The undisputed facts fall well short of establishing that the police "honored" Blake's choice not to deal with the authorities at any point in the process. The lower courts did not find, and, indeed, it would have been irrational to find, that the authorities made it "clear" to Blake that "they intended to honor his choice to communicate with them only through counsel." Instead, the Maryland courts rejected the claim that the official impropriety was cured and concluded that Blake's supposed "initiation" was "'in direct response to'" the "coercive" conduct of the police.[14] *Blake v. State*, 381 Md. 218, 238-39, 849 A.2d 410, 422 (2004). The fact findings and legal conclusions of the lower courts are unimpeachable on this record.

At the outset, the backdrop for the events in this case must not be overlooked. Respondent was a 17-year-old juvenile who was taken from his home in the early morning hours. While still in a state of undress that could only have increased his vulnerability, he was placed in a holding cell. He then clearly informed the authorities that he was incapable of

14. This includes both the judge who ruled on the suppression motion and the Court of Appeals. The intermediate Court of Special Appeals erroneously reversed for lack of interrogation, not because the respondent's question was independent of the officer's initiation of communications. Consequently, the State's position finds no support in the record or in *any* of the three lower court rulings.

dealing with them without legal assistance.

Next, the nature of the "official initiation" that occurred must be taken into account. Officers returned to Blake's holding cell a mere thirty-five minutes after he had asked for counsel. One officer handed him the charging document and emphasized that the charges were serious and that he needed to read and understand them. Along with an erroneous description of the penalty for the offense as "DEATH," the papers informed Blake that his cohort had made a statement blaming him for the murder. In conjunction with the delivery of the document, Officer Reese, who had no legitimate reason for being present, directed toward Blake a gratuitous, "loud and confrontational" remark, saying "'I bet you want to talk now, huh!'" *Id.* at 224, 849 A.2d at 413.[15]

Accurate description of the specific *Edwards* violation that occurred is important. One cannot sensibly decide whether officers have "cured" the harm of their improper initiation unless the nature of that initiation and the magnitude of that harm are identified. Clearly, it should be harder to eliminate the psychological effects of a particularly coercive official initiation. It should be much more difficult to counteract a potent message of disrespect for a suspect's clear request for counsel. The State's portrayal of the initiation that occurred misleadingly suggests that it consisted of a simple, "unexpected comment," Brief for Petitioner at 3, and that it was a mere improper "remark," *id.* at 7, and a "single impropriety." *Id.* at 19. In fact, the initiation of communications in this case was at the opposite end of the spectrum. Officer Reese's uncalled for statement alone sent an

15. The State punctuates this "statement" with a question mark. See Brief for Petitioner at 3, 26. This implicit concession that Officer Reese asked Blake an express question seems correct, for the remark clearly was "interrogatory" in nature. *Blake*, 381 Md. at 236, 849 A.2d at 420.

undeniably powerful message of disrespect for Blake's declaration of incapacity and need. Loudly and confrontationally, and for no ostensible reason other than to provoke Blake, see *Blake*, 381 Md. at 235, 849 A.2d at 420, Officer Reese directly challenged him to respond to an accusation that appeared to carry the ultimate penalty and to a cohort's declaration that he was culpable. The psychological impact on Blake must have been devastating.

Furthermore, Officer Reese's charged remark was not the only official impropriety. Detective Johns delivered a charging document that erroneously informed Blake that he was facing death and accurately apprised him of a cohort's effort to place the blame on him. He emphasized that the charges were serious and that Blake needed to read them. If Detective Johns had simply decided, on his own, to inform Blake orally that he was charged with murder, that the penalty was death, and that his cohort had accused him, he would unquestionably have been held responsible for "initiating" communications. Neither the fact that the communication here was in writing nor the fact that state law required a defendant to be served with the document should alter that conclusion. The impact on a vulnerable suspect would be identical in both cases. And surely state law cannot authorize and immunize conduct that generates intolerable risks of Fifth Amendment violations.[16] When combined with Officer Reese's challenge, the delivery of the charging document constituted an extremely

16. Even if there was a state interest served by promptly and accurately informing a suspect of the simple nature of the charges he is facing, there would be no need to include more than the bare details. It is hard to imagine what legitimate state interest is served by including a cohort's accusatory statement. More important, once a suspect has asked for counsel, all such information can be promptly conveyed to him *through* counsel. See *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (White, J., concurring).

coercive initiation of communications with overwhelming psychological impact.[17]

Even if some *Edwards* violations can be remedied, it is arguable that an infection of the process as virulent as the one injected here is incurable. At the very least, a poison this potent requires an exceptionally strong antidote. It is inconceivable that the measures taken in this case sufficed, and, indeed, the lower courts properly found that they did not. The State's cure contention, in fact, rests entirely on a single fact–Detective Johns's response to Officer Reese's comment. Under any rational cure standard, that action is scarcely capable of the heavy lifting the State would have it perform. Viewed in context, it surely did not undo the damage done or eliminate the risks created by the officers' coercive initiation. The situation, of course, must be viewed from the viewpoint of the suspect. *Arizona v. Roberson*, 486 U.S. at 687 ("*Edwards* focuses on the state of mind of the suspect and not of the police"). From Blake's standpoint, or the vantage point of any reasonable person in his position, Officer Johns's negative response to Officer Reese could not have restored the *status quo ante*. It did not nullify the very loud and very clear message that the authorities were determined to deal with him without counsel. A contrary contention strains credulity.

First, Detective Johns's actions were directed toward Officer Reese alone. He addressed no potentially remedial

17. The lower courts implicitly recognized the potent nature of the conduct in this case by concluding that Officer Reese's statement was not merely the initiation of communications under *Oregon v. Bradshaw*, but was also official *interrogation* within the meaning of *Rhode Island v. Innis*. *Blake*, 381 Md. at 235-36, 849 A.2d at 420. The Court of Appeals concluded that the presentation of the charging document alone was not *interrogation*, but did not conclude that that conduct did not constitute post-invocation *initiation*. See *Blake*, 381 Md. at 236, 849 A.2d at 420.

comment toward Blake. Interaction with another officer is much less likely to have an impact on a bystander suspect. See *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (fact that remarks were addressed to another officer, not to the suspect, counted against a finding of "interrogation"). It is possible that Johns's reaction had some marginal ameliorative effect. On the other hand, considering all of the circumstances, a vulnerable suspect like Blake is just as likely to have been confused, disoriented, or to have felt even more pressure after witnessing Johns's reaction to Reese.[18]

In addition, Detective Johns returned to Blake's cell after a mere twenty-eight minute break. Time could be a relevant factor in dissipating the psychological effects of official initiation. A lengthy hiatus after a genuine, substantial curative measure might weigh in favor of cure.[19] The short time period in this case–the fact that Officer Johns was back at Blake's cell soon after he had heard and seen powerful indications that the authorities wished to speak to him without counsel–should count against the possibility that a cure occurred. The detective's quick return in the absence of counsel precludes a finding that the pressure brought to bear on Blake had dissipated. Blake's inquiry whether he could

18. The conduct of Officer Reese and Detective Johns smacks of the "Mutt and Jeff" routine described in *Miranda*. See 384 U.S. at 452. This is not meant to suggest that the officers planned the episode or that Detective Johns's reaction was insincere. The point is merely that to any suspect who had been confronted by Reese and had seen the charging document (much less a 17-year-old murder suspect, arrested in the early morning hours, alone in a jail cell, still clad in underwear) Johns's statement that because Blake had asked for a lawyer the officers could not talk to him might well have been perceived as a further reflection of the officers' *desire* to interrogate him in the absence of counsel.

19. On the other hand, pressure to submit can grow as custody is prolonged. See *Minnick v. Mississippi*, 498 U.S. at 153.

"*still* talk" to the officer suggests an understandable perception that the two visits to his cell were part of one continuous process designed to secure his cooperation in the absence of counsel. See *Blake*, 381 Md. at 239, 849 A.2d at 422.

The undisputed facts belie any finding that Blake's inquiry was a product of an unprovoked, voluntary change of heart regarding counsel. It was clearly a response to the improper initiations that had occurred. The State's suggestion that Blake's inquiry was not the product of Officer Reese's statement, but was instead an independent initiation of communications is patently contrary to the fact finding of the suppression court, see *Blake*, 381 Md. at 227, 849 A.2d at 415, and to the appellate court's conclusion that this finding was not clearly erroneous.[20] In addition, the State *concedes* that Blake's inquiry was the product of reading the content of the erroneous charging document. Brief for Petitioner at 10, 27. The police took not a single step to counteract the powerful effects of falsely informing Blake that he faced "DEATH" or of confronting him with his cohort's accusation. Blake's question undoubtedly was the result of the State's unjustified and potent pressures to submit to questioning without a lawyer's help. The reaction of Detective Johns to Officer Reese could not and did not cure the unjustifiable, coercive, and compound *Edwards* violation in this case.

The case for finding that the police cured their *Edwards* violation here is exceedingly weak. A conclusion that the harm of the official improprieties was undone and that the significant constitutional risks engendered were eliminated could be based only on an unduly permissive legal standard for assessing cure or on an indefensible disregard of the

20. Blake responded to the earlier actions and to the charging document at the earliest opportunity he had to do so. See *Blake*, 381 Md. at 227, 849 A.2d at 415 (reporting conclusion of Circuit Court judge).

uncontroverted facts and fact finding. Because the balance of interests in this particular case overwhelmingly favors the respondent, the Court of Appeals properly concluded that no "cure" was effected and that Blake did not initiate communications after he clearly requested a lawyer.[21]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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21. The State accuses the appellate court of an improper "fruits" analysis and of inappropriately "penalizing police error." Brief for Petitioner at 29, 31. These criticisms are far from the mark. At issue in this case are the *statements* made as a *direct result* of an *Edwards* violation, *not* evidence *derived from* such statements. The appellate court's conclusion that Blake's inquiry was the product of the official initiation is a substantive *Miranda* law determination involving no "fruits" analysis whatsoever. Moreover, the decision below showed no concern with penalizing officers, but, rather, was directly concerned with excluding statements that were presumptively compelled and threatened to violate the Fifth Amendment if used in the courtroom.